NO. 81-6435

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CAREY DEAN MOORE,

Petitioner,

vs.

THE STATE OF NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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QUESTIONS PRESENTED

1. Does the Nebraska Supreme Court procedure for reviewing capital murder cases without comparison of similar cases of "criminal homicide" which have not resulted in capital punishment violate the Eighth and Fourteenth Amendments?

2. Is the Nebraska Supreme Court's refusal to follow legislatively mandated review procedures and its affirmance of Petitioner's sentence of death in apparent violation of Nebraska law violative of the Eighth and Fourteenth Amendments?

3. Does application of the aggravating circumstances that the murder "manifested exceptional depravity by ordinary standards of morality and intelligence" to the facts of Petitioner's case violate Godfrey v. Georgia, 446 U.S. 420 (1980)?

   a. If so, does the affirmance of Petitioner's sentence based in part on such aggravating circumstances violate the Fourteenth Amendment principles of Stromberg v. California, 283 U.S. 359 (1931) and Stephens v. Zant, 631 F. 2d 397 (5th Cir. 1980) modified 648 F. 2d 446 (5th Cir. 1981), pending review by Petition for Writ of Certiorari in Zant v. Stephens, No. 81-89?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

NO. _____

CAREY DEAN MOORE,

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vs.

THE STATE OF NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEBRASKA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Nebraska entered on January 29, 1982.

OPINION BELOW

The opinion of the Supreme Court of the State of Nebraska in the case of Carey Dean Moore is reported at 210 Neb. 457, 316 N.W. 2d 33 (1982), attached as Appendix A.

JURISDICTION

The judgment of the Supreme Court of the State of Nebraska was rendered on January 29, 1982 and entered on that date. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case involves the following provisions of Nebraska law. (See Appendix B).

Neb. Rev. Stat. 1943, Reissue 1979, 28-303

Neb. Rev. Stat. 1943, Reissue 1979, 29-2519 through 29-2525

Neb. Rev. Stat. 1943, Reissue 1979, 29-2528

Neb. Rev. Stat. 1943, Reissue 1979, 29-2521.01 through 2521.04

Neb. Rev. Stat. 1943, Reissue 1979, 29-2522

Neb. Rev. Stat. 1943, Reissue 1979, 29-2524

Neb. Rev. Stat. 1943, Reissue 1979, 29-2524.01 through 2524.02

STATEMENT OF THE CASE

The Petitioner was arrested on August 29, 1979 near Charles City, Iowa on a traffic stop by an Iowa State Trooper. In checking the Petitioner's identification and as a result of the volunteered statements made by the Petitioner, he was taken into custody on suspicion of auto theft. Shortly thereafter, in making routine checks with the Omaha Police Department, the Iowa police officials were requested to hold the Petitioner in connection with an ongoing investigation of the two homicides in Omaha, Nebraska. Omaha police arrived in Charles City, Iowa where the Petitioner was being held and after properly advising the Petitioner of his rights, the Petitioner admitted the commission of the Omaha murders. He waived extradition and was returned to Nebraska where charges were filed by the County Attorney of Douglas County, Nebraska, charging him with two counts of first degree murder (T-1,2). The Court appointed the Public Defender to represent the Petitioner after he indicated he had no funds with which to obtain counsel (T-35). (See certified copy of Order of Appointment and Petitioner's Poverty Affidavit appended hereto).

Pretrial hearings were held to suppress certain statements made by the Petitioner and the trial court ruled all such statements were admissible.

The Petitioner also challenged the constitutionality of Nebraska's death penalty statutes in a motion to the trial court (T-70), which was denied in its entirety (T-75). These issues were again raised by the Petitioner in his brief and arguments to the Nebraska Supreme Court (see Appendix A).

The Petitioner waived his right to a jury and was tried and convicted by the Court of both charges and after a determination by a three judge panel in its order of sentence, the Petitioner was sentenced to death on each first degree murder count (T-76).

The conviction and sentences were appealed to the Nebraska Supreme Court which affirmed the conviction and sentences in an opinion rendered January 29, 1982 (see Appendix A).

THE NEBRASKA PROCEDURES FOR IMPOSING THE SENTENCE OF DEATH UPON THE PETITIONER ARE DEFICIENT IN THE FOLLOWING RESPECTS:

A. THE NEBRASKA SUPREME COURT IMPROPERLY FAILED TO COMPARE THE PETITIONER'S CASE WITH OTHER "CRIMINAL HOMICIDES" AS REQUIRED BY NEBRASKA STATUTE.

The Nebraska Supreme Court in Petitioner's case affirmed the sentence of death imposed upon the Petitioner after comparing the Petitioner's case only with those of other capital murders which have been appealed to the Nebraska Supreme Court since April 20, 1973. The Nebraska Supreme Court specifically held that it would refuse to follow the legislatively mandated procedure for comparing the Petitioner's case with other "criminal homicides" to determine whether the "sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances".[1] Sections 29-2521.02, 29-2521.03, R.R.S. 1943, Reissue of 1979. The Nebraska Supreme Court, therefore, has, in counsel's opinion, not only failed to comply with the constitutional mandate of this Court in placing a heavy emphasis on appellate review to insure that a situation does not exist wherein "there is no meaningful basis for distinguishing the few cases which

[1]The Nebraska Supreme Court held that the legislative mandate was a violation of the "separation of powers doctrine" and the action of the Nebraska Legislature unconstitutionally, under the Nebraska State Constitution, limits the function of the Nebraska Supreme Court in reviewing capital cases. State v. Moore, 210 Neb. at 474, 476. The Court stated that "It is plain that under the principals we have earlier cited, that legislation which attempts to achieve such results [review of all criminal homicides] is an intrusion of the judicial function, contrary to the separation of powers doctrine and this violates Article II, Section 1 [of the Nebraska Constitution]. Another affect of LB 711 would be to unconstitutionally restrict the appellate review powers of this court under the Nebraska Constitution Neb. Const. Art. 1, Section 23 as that legislation attempts to bind this court by requiring it to apply sentences imposed in some 'analogous' case . . . " 210 Neb. at 476. "Upon this closer review of LB 711, it is clear that the legislature in that act attempts to exercise the judicial function in violation of the Constitution. Sections 2 and 3 of LB 711 must be restricted in their application to a comparison in this Court of only those cases in which the defendant in the District Court has been convicted of murder in the first degree". 210 Neb. at 476. The court thus stating went on to comment that their construction was "co-extensive with our duty under the federal constitution, under our own state constitution, and under the statutory provisions for automatic review [in capital cases)". 210 Neb. at 476.

(death) is imposed from the many cases in which it is not" (Furman v. Georgia, 408 U.S. 238 at 313 (1972)), but has also judicially affirmed the sentence of death upon the Petitioner in defiance of the express legislatively authorized means of determining review of the death sentence in Nebraska.

It was just because of this Court's heavy emphasis on appellate review that the Nebraska Legislature created Sections 29-2521.01 through 2521.04, 29-2522, 29-2524 and 29-2524.01 through 2524.02. These statutes require the Nebraska Supreme Court to review all cases of "criminal homicide" after April 20, 1973, the effective date of the "new" death penalty statute. The words "criminal homicide" clearly encompass in plain language crimes other than those of capital murder. The obvious direction of this Court in its decisions and also in the Nebraska Amendments to its statute concerning the Nebraska Supreme Court review, is to insure "reliability" and "uniformity" in the determination of the death sentence. Beck v. Alabama, 447 U.S. 625 (1980); Gardner v. Florida, 430 U.S. 349 (1977).[2] The Nebraska statute on comparative review addresses itself to this Court's decisions which accept the proposition that capital cases require special treatment due to the qualitative difference of the penalty of death from other sentences and the subsequent need to insure reliability and uniformity in sentencing. However, the Nebraska Supreme Court has consistently refused to follow the plain

[2]The Legislature of the State of Nebraska passed Section 29-2521.01 and the companion sections requiring comparative review of "criminal homicides" based on its perception of both the legal imperative of this Court and also of the "evolving standards of decency" (Trop v. Dulles, 356 U.S. 86 (1958)) of the citizens of the State of Nebraska. The Legislature expressed the wishes of its citizens that "life is the most valuable possession of a human being, and before taking it, the State should apply and follow the most scrupulous standards of fairness and uniformity". Section 29-2521.01(1). The Legislature expressed what was common knowledge that "charges resulting from the same or similar circumstances have in the past not been uniform and have produced radically differing results". Section 29-2521.01(4). The Legislature expressed the wishes of its citizens that "an offense which would not result in a death sentence in one portion of a state should not result in death in a different portion". Section 29-2521.01(3). And that the review by the Supreme Court of "all criminal homicides" was necessary "in order to compensate for lack of uniformity". Section 29-2521.01(5).

language of these statutes and has allowed sentencing based only on the consideration of the case before it with other death penalty cases in Nebraska subsequent to April 20, 1973. This type of appellate review does not meet the requirements this Court has set forth in Godfrey v. Georgia, 446 U.S. 420 (1980), nor does it comply with the expressed will of the citizens of the State of Nebraska as set forth by the Legislature. The result of the Nebraska Supreme Court's conscious and deliberate refusal to consider "all criminal homicides" renders any judgment on the penalty of death unconstitutional since there has been no meaningful appellate review either under the statutory scheme or under the constitutional requirements set forth by this Court. Previous to the Petitioner's case, Petitioner's position in this regard has been voiced by the lone dissents in recent Nebraska capital cases by its Chief Justice. State v. Peery, 199 Neb. 656, 261 N.W. 2d 95 (1977); State v. Williams, 205 Neb. 56, 287 N.W. 2d 218 (1979); State v. Otey, 205 Neb. 90, 287 N.W. 2d 76 (1979); State v. Holtan, 205 Neb. 314, 287 N.W. 2d 671 (1980); State v. Rust, 208 Neb. 320, 303 N.W. 2d 490 (1981) and State v. Harper, 208 Neb. 568, 304 N.W. 2d 663 (1981).[3] Chief Justice Krivosha in State v. Harper, supra, made a review as required by the Nebraska statutes and, by actually comparing the defendant's case with other criminal homicides rather than with just capital cases, he came to the inescapable conclusion from his analysis that in fact the defendant had been arbitrarily and capriciously sentenced to death. Chief Justice Krivosha's dissent in the Petitioner's case, while not giving any reasons in Petitioner's case, certainly expresses those same

[3] In State v. Harper, Chief Justice Norman Krivosha stated that "I have now concluded that under the limitations imposed upon courts by both the federal and state constitutions the imposition of the death penalty as now applied in most other circumstances is arbitrary and capricious and not permitted". 208 Neb. at 581.

conclusions.[4] In Petitioner's case, for the first time, a second Justice, Justice White, joined Chief Justice Krivosha in dissenting from the affirmance of the defendant's sentence of death. However, the majority of the Nebraska Supreme Court has held that the mandate of the Nebraska Legislature requiring it to compare Petitioner's case to other "criminal homicides" is unconstitutional under the Nebraska Constitution as an unpermitted breach of the separation of powers of the judicial and legislative branches. The Court holds simply that all it is required to do under the federal constitution is what it is doing, that is, comparing the Petitioner's case with other capital cases. After such a review, the majority, reaching a quite different conclusion from the two dissenters who have compared the Petitioner's cases to other "criminal homicides", had no difficulty affirming the sentence of death in the Petitioner's case.

Counsel believes that this Court has relied heavily on the legislative judgments as indicia of the "standards of decency" by which the Eighth Amendment limits are largely defined. See Gregg v. Georgia, 428 U.S. 153, 174-76 (1976); Coker v. Georgia, 433 U.S. 584 (1977). Counsel does not believe this Court has ever been presented before with a case wherein a death sentence was judicially imposed by a state court which had expressly refused to follow the

[4] The Chief Justice Norman Krivosha remarked in his dissent in State v. Harper that the adoption of the Nebraska statute on special procedures for homicide cases and the provisions of LB 711 (the Legislative Bill number for Nebraska's comparative review statute) was "simply a response to the United States Supreme Court's recognition that it is a violation of an individual's constitutional right when the decision to execute is arrived at in an arbitrary and discriminatory manner. The fact that we may create criteria to aid us in imposing the death penalty does not overcome the constitutional prohibition if, after applying the formula, we nevertheless continue to impose the penalty in an arbitrary and capricious manner". (Emphasis in original). 208 Neb. at 582. The Chief Justice further relies on this Court's opinion in Gregg v. Georgia in support of that conclusion. The Chief Justice further notes in his dissent in State v. Harper that while prosecutorial discretion is "not within the control of the courts, and should not be within the control of the courts, I, nonetheless cannot ignore the reality of those matters in attempting to determine whether the death penalty is imposed in a nonarbitrary and noncapricious manner in this state". 208 Neb. at 586. The Chief Justice found clearly from his examination of "a host of cases decided within this jurisdiction. . . that the imposition of the death penalty in most cases in this state is indeed arbitrary and capricious . . .". 208 Neb. at 583.

applicable state statutes requiring review of that sentence.[5] Counsel submits that refusal to review other "criminal homicides" for the reason that there are prosecutorial decisions involved which are outside the control of the courts, still results in the same likelihood that death will be "freakishly" imposed which was the very basis of this Court's determination and decision in Furman v. Georgia, 408 U.S. 238 (1972).[4a]

B. THE NEBRASKA SUPREME COURT AFFIRMED THE PETITIONER'S SENTENCE BASED, AT LEAST IN PART, ON AN UNCONSTITUTIONAL FINDING THAT HIS CRIME "MANIFESTED EXCEPTIONAL DEPRAVITY BY ORDINARY STANDARDS OF MORALITY AND INTELLIGENCE".

The Nebraska Supreme Court in the Petitioner's case expressly found that the Petitioner's crimes "manifested exceptional depravity by ordinary standards of morality and intelligence". Affirming the Petitioner's sentence of death on this ground directly violates this Court's holding in Godfrey v. Georgia, supra.

This Court, in Godfrey v. Georgia, quoting from its decision in Gregg v. Georgia, stated that "It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an openended construction". 446 U.S. at 422-23. Of course, in Godfrey v. Georgia, as this Court well knows, the Petitioner killed his wife and his mother-in-law instantly by shooting them in the head with a shotgun. This Court, in reversing the sentence

[4a] See fn. 4, comments of Chief Justice Kirvosha on prosecutorial discretion.

[5] The Nebraska Supreme Court has consistently, up until the Petitioner's case, refused to give any reasons for its refusing to follow the Nebraska comparative review statutes. In State v. Williams, 205 Neb. 56, 287 N.W. 2d 18 (1979) the Court simply stated that to interpret the language of the statute "literally would create insurmountable constitutional problems. In view of the disposition made here, it is unnecessary to discuss constitutional issues". 205 Neb. at 76. The Court in State v. Harper, supra, simply stated, in response to a similar request for review of the Court's procedures under the comparative review sections, stated "We decline to do so and we reaffirm our holdings in State v. Williams (cite omitted)."

of death, found that the Georgia Supreme Court adopted an overbroad and vague construction of the aggravating circumstance such that almost any murder could be characterized in that way.

Counsel submits that is exactly the circumstance that exists in the Petitioner's case by the Nebraska Supreme Court's interpretation of the aggravating circumstance here. The Petitioner killed both of his victims instantly and there was no suffering or torture involved. However, the Nebraska Supreme Court would permit this aggravating circumstance under an interpretation which would, in effect, make any capital murder automatically subject to this standard.[6] The Nebraska Supreme Court supports its position by postulating the circumstances that (1) the Petitioner's murders were "cold bloodedly planned as part of robberies", (2) that the Petitioner was going to continue killing and (3) that he had selected older individuals and "his unstated conclusion was that human life in the middle years is less valuable than a younger life". State v. Moore, 210 Neb. at 471.

The first part of the Court's findings would clearly be applicable to any and every first degree murder case since by definition it is a premeditated and deliberate and intentional killing. The Nebraska Supreme Court's further conclusions that this aggravating circumstance should apply, at least in part, because of the Petitioner's "unstated conclusions . . . that human life in the middle years is less valuable than a younger life" is constitutionally impermissible and is based on wholly speculative and unsubstantiated opinions of the members of the Court. If there is to be a specific basis for upholding the penalty of death upon the Petitioner, it is most certainly not in the personal opinions of Supreme Court Justices in reading into the evidence facts which cannot be objectively determined. To do so is certainly to deny the Petitioner due process and create an atmosphere where the penalty of death will not be imposed with "reliability" and "uniformity".

[6] In vacating the sentence of death against the defendant in Godfrey v. Georgia, this Court found "that Petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than any other person guilty of murder . . . there is no principled way to distinguish this case in which the death penalty was imposed from the many cases in which it was not". 446 U.S. at 433.

The Nebraska Supreme Court states that this Court's opinion in Godfrey v. Georgia "clearly does not control in this case" (210 Neb. at 469) and then goes on to indicate one of the reasons it does not was very specific findings of the sentencing panel in Petitioner's case. Such findings, as just summarized above, simply do not meet the standards of this Court in Godfrey v. Georgia.

The Nebraska Supreme Court further seeks to insulate its ruling from this Court's opinion in Godfrey v. Georgia by noting that "the imposition of the death penalty in this case before us did not rest wholly upon a finding of the existence of aggravating circumstance (1)(d) of Section 2523". State v. Moore, 210 Neb. at 469. The Nebraska Supreme Court seemed to put much emphasis on the fact that in Godfrey v. Georgia the sentence of death resulted solely on that one aggravating circumstance, and therefore the Petitioner's case was different since there were clearly other aggravating circumstances existing. State v. Moore, 210 Neb. at 469, 471. This Court presently has under review Zant v. Stephens, No. 81-89, which examines whether a sentence of death can be sustained if even one of several aggravating circumstances is found constitutionally deficient. The Circuit Court in Stephens v. Zant, 691 F. 2d 397 (5th Cir. 1980) in holding that the sentence in that case violated Godfrey v. Georgia, held that where the penalty of death was based on several aggravating circumstances, one of which was subsequently held to be unconstitutional that it was "impossible for a reviewing court to determine satisfactory that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance". Stephens v. Zant, 631 F. 2d at 406.

If the application of the aggravating circumstance that the Petitioner's crime "manifested exceptional depravity by ordinary standards of morality and intelligence" is constitutionally impermissible, then the Petitioner's sentence of death must be vacated.

This is especially compelling in the circumstances of the Nebraska procedure since that procedure utilizes a balancing of the aggravating and mitigating circumstances. The sentence of death can only be imposed if there is a finding that the aggravating circumstances outweigh the mitigating circumstances. See Section

29-2522(1),(2), R.R.S. 1943, Reissue 1979. Obviously, this balance would be altered by the removal from consideration of any aggravating circumstance or part thereof.

The Petitioner's case therefore raises a serious question as to the validity of the Nebraska Supreme Court's holding under this Court's ruling in Stromberg v. California, 283 U.S. 359 (1931), used as authority by the Court in Stephens v. Zant, supra.

CONCLUSION

For all of these reasons, Petitioner respectfully urges this Court to grant his Petition for Writ of Certiorari to the Supreme Court of Nebraska.

Respectfully submitted,

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By _____
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STATE OF NEBRASKA, APPELLEE, V. CAREY DEAN MOORE, APPELLANT.

___N.W.2d___

Filed January 29, 1982. No. 42557.

1. **Constitutional Law: Death Penalty.** The death penalty is not per se cruel and unusual punishment in violation of the eighth and fourteenth amendments to the Constitution of the United States and article I, §§ 3 and 9, of the Bill of Rights of the Constitution of Nebraska.
2. **Constitutional Law: Aggravating and Mitigating Circumstances: Death Penalty: Sentences.** Neither the Constitution of the United States nor the Constitution of Nebraska requires determination by a jury of the applicability of the aggravating and mitigating factors in determining under the provisions of Neb. Rev. Stat. §§ 29-2522 and 29-2523 (Reissue 1979) whether the penalty shall be death or life imprisonment, and the provision of determination of the penalty by the trial judge or a vision of determination of the penalty by the trial judge or a panel of judges after notice and hearing is constitutional. p. 458
3. **Constitutional Law: Aggravating and Mitigating Circumstances: Words and Phrases.** The definitions of aggravating circumstances in Neb. Rev. Stat. § 29-2523 (Reissue 1979) are not too broad or vague and will be given a narrow construction and narrow application, and as so construed and applied are constitutional.
4. **Criminal Defendants: Homicide: Words and Phrases.** A state of mind of the accused which indicates a callous disposition to repeat the crime of murder manifests exceptional depravity by ordinary standards of morality and intelligence within the meaning of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1979).
5. **Criminal Defendants: Homicide.** A substantial history of serious assaultive or terrorizing criminal activity includes a previous premeditated murder.
6. ____: ____. The fact that a murder is committed to conceal the identity of the perpetrator of a robbery satisfies the requirements of Neb. Rev. Stat. § 29-2523(1)(b) (Reissue 1979).
7. **Criminal Defendants: Aggravating and Mitigating Circumstances: Sentences.** Neb. Rev. Stat. § 29-2523 (Reissue 1979) does not limit in any way the mitigating factors or circumstances which the court may consider, and the sentencing court should be liberal in admitting evidence of facts which the convicted defendant asserts are mitigating factors.
8. **Constitutional Law: Aggravating and Mitigating Circumstances: Proof.** Neither the Constitution of the United States nor the Constitution of the State of Nebraska requires the prosecution to prove the absence of mitigating factors.
9. **Constitutional Law: Death Penalty: Sentences.** Neb. Rev. Stat. §§ 29-2520 and 29-2522 (Reissue 1979) are not unconstitutional because the sentencing hearing may be held and the sentence may be imposed either by the trial judge or a sentencing panel consisting of the trial judge and two other district judges.
10. **Death Penalty: Sentences.** The imposition of the death sentence in this case is justified by the application of the standards provided by Neb. Rev. Stat. § 29-2523 (Reissue 1979), as interpreted and limited by the definitions of this court.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger for appellant.

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Paul L. Douglas, Attorney General, and J. Kirk Brown for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

The defendant, Carey Dean Moore, age 22, was charged with two counts of first degree murder as follows: (1) On August 22, 1979, having killed Reuel Eugene Van Ness, Jr., in the perpetration of or attempt to perpetrate a robbery, and (2) on August 27, 1979, having killed Maynard D. Helgeland in the perpetration of or attempt to perpetrate a robbery. After waiving a trial by jury, defendant was tried by the court and found guilty on both counts. Pursuant to the provisions of Neb. Rev. Stat. §§ 29-2520 et seq. (Reissue 1979), a sentencing hearing was held on May 22, 1980, before a panel of three judges, including the trial judge. On June 20, 1980, the defendant was, on each count, sentenced to the penalty of death by electrocution.

The case has come to this court for automatic review. The defendant assigns the following alleged errors: (1) The Nebraska statutes providing for capital punishment are unconstitutional because the death sentence is per se unconstitutional and prohibited by the eighth and fourteenth amendments to the U.S. Constitution and article I, § 9, of the Bill of Rights of the Nebraska Constitution. (2) Neb. Rev. Stat. §§ 29-2519 through 29-2523 (Reissue 1979), providing the conditions under which the death penalty may be imposed, are unconstitutional because they do not provide for a jury determination of the existence of the aggravating and mitigating circumstances described in the statutes and the appropriateness of the death penalty. (3) Sections 29-2523 et seq. are unconstitutionally vague and indefinite, and appellate interpretation has not removed this ambiguity. (4) The sentencing panel of judges did not properly apply to the evidence in the case the aggravating and mitigating circumstances as defined by statute and the interpretations of this court. (5) The panel erred in its review of homicide cases in which the death penalty was not imposed, claimed by the defendant to be similar to the case at bar, because the panel limited its review in accordance with our opinion in *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979). (6) The death penalty statute is unconstitutional because it limits the mitigating factors which can be considered by the sentencing tribunal. (7) A conviction and sentence in a capital case cannot be sustained unless it appears beyond a reasonable doubt that no error in the factfinding of the trial contributed in any way to the determination of guilt. (8) . statutes are unconstitutional because they do not require the State to prove beyond a reasonable doubt that mitigating factors do not exist. (9) Th provision of the statutes providing that the sentencing phase may be heard before either the judge who presided at the trial or before a sentencing panel of three judges, including the trial judge, is unconstitutional because it provides no guidelines for the determination of when the sentencing is to be done by a single judge and by a panel. (10) The sentence of death is excessive and should be reduced to life imprisonment.

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We affirm the judgment and sentences.

The defendant did not introduce any evidence during the trial of the case. Therefore, there is no significant conflict on the issue of guilt. The defendant confessed commission of the two killings in taped interrogations by the police, which were introduced in evidence. It is not claimed that these confessions were involuntary.

An outline of the evidence, however, is necessary to a discussion of assignment (4) and in order that we may perform our independent function of determining whether the imposition of this particular death penalty is appropriate under the statutory standards, and to assure the death penalty is not imposed in an arbitrary and capricious manner.

Both of the victims were cabdrivers, and the modus operandi in each case was similar. About August 20, 1979, the defendant purchased the handgun with which the murders were committed. He acquired the gun by purchasing it from a cabdriver who had pawned the gun. The defendant and the seller went together to the pawn shop where the gun was redeemed, the defendant furnishing the money for the redemption and paying the seller an additional $50. The gun was then test-fired.

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We now quote from the findings made by the sentencing panel in its order, which findings are fully supported by uncontroverted evidence: "The defendant's own statements, in his confession to Officers O'Donnell and Thompson while in custody at Charles City, Iowa, indicate that these crimes had been in the planning stage for at least a day or two before the Van Ness homicide. Apparently on the evening prior to the Van Ness murder, the defendant had called a number of cabs from a telephone booth somewhere on Farnam Street in the downtown Omaha area to see how quickly each would respond to his call. The defendant then hid somewhere in the vicinity to await each cab's arrival, at which time he checked the cab to determine whether the driver would be a suitable victim, *i.e.*, not too young, since the defendant stated that it was easier for him to shoot an older man rather than a younger man nearer his own age. On the evening of the Van Ness homicide, the defendant's plan was to call one cab at a time from the Smoke Pit restaurant, and, if the driver who responded 'wasn't too old,' the defendant would just not identify himself as the fare for which the cab had been summoned. When Mr. Van Ness arrived at the Smoke Pit on August 22, 1979, the defendant determined that this was the driver who would be robbed and shot because 'he wasn't too young'.

"A similar pattern of events unfolded on August 26, 1979. The defendant went to the Greyhound Bus depot at 18th and Farnam Streets in Omaha that evening, and, when he saw a lone cab with an older driver parked at the taxi stand outside the depot, he got into the cab and directed the driver to take him to the Benson area. According to the defendant, this particular cab and driver were selected both because there were no other cabs at the taxi stand at the time, thus decreasing the chances of the defendant's being identified, and because the driver was an older man. The defendant then stated that, as previously discussed, he had planned ahead of time to rob and shoot the driver of whichever cab he selected." In his confessions the defendant stated that he killed each of the victims in order that the victim would not be able to identify him as the robber. p. 462

The body of Van Ness was found at Dam Site 16 near Omaha on the morning of August 22, 1979. The body of Helgeland was found in his cab in Omaha about 7:30 a.m. on August 27, 1979. The defendant was positively identified as one of two persons getting into the Van Ness cab at the Smoke Pit restaurant in Omaha earlier that morning. The other person was identified as his younger brother. He was positively identified by fishermen as being in the cab at Dam Site 16 before the slaying, when Van Ness asked directions in order to take the defendant to the place at the dam where he wished to go. The gun, identified by expert witnesses as the one used in the two slayings, was found in the defendant's possession in a stolen automobile when the defendant was apprehended in Iowa on August 29, 1979.

The contention of the defendant that the death penalty is in all circumstances unconstitutional as constituting cruel and unusual punishment has been rejected by the U.S. Supreme Court and this court on a number of occasions. We need not respond to that argument other than citing some of the pertinent precedents. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976);

State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977); *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979); *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980); *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981). p. 463

The defendant cites no judicial precedent or constitutional provision supporting a proposition that the U.S. and the Nebraska Constitutions require that, in order that the death penalty may be constitutionally imposed, a jury make the factual determinations pertaining to aggravating and mitigating circumstances. We have expressly rejected that contention in *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977). We there said at 559, 250 N.W.2d at 888: "As we understand the federal and the state constitutional provisions, they do not require or even suggest that jury sentencing is constitutionally required. Whatever the relative merits of sentencing by a judge or jury may be, we need not consider them. Our concern is the constitutionality of the Nebraska system, under the federal and state Constitutions. The relative merits of the one or the other is for legislative and not judicial determination. We find the sentencing procedure provided by the Nebraska statute does not violate either the Nebraska or the federal Constitution." The U.S Supreme Court has, at least implicitly, rejected the contention that jury determination of the sentence is required. *Proffitt v. Florida*, *supra*. In that case the Court said in 428 U.S. at 252: "The basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge rather than by the jury. This Court has pointed out that jury sentencing in a capital case can perform an important societal function, *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15 (1968), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." p. 464

The defendant's third contention, asserting that the definitions of aggravating and mitigating circumstances in the statute are so vague and indefinite as to be unconstitutional, has been addressed by this court in a series of cases which refine, clarify, and restrict that definition in response to such arguments. *State v. Simants*, *supra*; *State v. Rust*, *supra*; *State v. Stewart*, *supra*; *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977); *State v. Otey*, *supra*; *State v. Anderson and Hochstein*, *supra*; *State v. Harper*, *supra*. It is clear that the general scheme of § 29-2523 meets the requirements laid down in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). See, *Gregg v. Georgia*, *supra*; *Proffitt v. Florida*, *supra*. We need at this time address only the specific arguments which the defendant makes in this case. The defendant's third, fourth, and fifth assignments overlap and so we will discuss them together.

It is necessary at this time to make some reference to the sentencing panel's order and the findings therein. The panel made a detailed analysis of the evidence, the provisions of § 29-2523, and the decisions of this court interpreting that statute. It considered each statutory provision separately and made factual

findings based upon the evidence adduced at trial and at the sentencing hearing by both the State and the defendant. On the basis of that analysis, it made specific findings as to which aggravating and which mitigating circumstances existed in this case, including the applicability of the statutory provisions which are disjunctive.

We will later, where necessary, make reference to the details of that analysis. At this point, it will suffice to quote the panel's summary of affirmative findings.

"The sentencing panel specifically finds that, with regard to the murder of Reuel Van Ness, Jr., aggravating circumstances (b) and (d) have been found to exist beyond a reasonable doubt. By way of clarification, the panel more specifically finds that the second clause of aggravating circumstance (1)(b) (' . . . committed . . . to conceal the identity of the perpetrator') and the latter portion of aggravating circumstance (1)(d) (' . . . manifested exceptional depravity by ordinary standards of morality and intelligence')] are applicable in this case. p. 465

"With regard to the murder of Maynard Helgeland, the sentencing panel specifically finds that aggravating circumstances (a), (b), and (d) have been found to exist beyond a reasonable doubt. More specifically, the panel finds that the second clause of aggravating circumstance (1)(a) ('The offender . . . has a substantial history of serious assaultive or terrorizing criminal activity') is applicable to the Helgeland homicide, based on the murder four days earlier of Reuel Van Ness, Jr. In addition, the second clause of aggravating circumstance (1)(b) and the latter portion of aggravating circumstance (1)(d) are applicable to the Helgeland homicide, as they were to the Van Ness homicide."

The panel also reiterated generally its previous, more specific findings that none of the statutory mitigating factors existed, but stated that "the family background and upbringing of the defendant are entitled to consideration as a mitigating factor . . . ." It found that factor did not outweigh the aggravating circumstances.

The defendant's claim of vagueness in the statutory language and deficiency in appellate refinement of definition is directed at the language of § 29-2523(1)(d), which states: "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."

The defendant argues that under the holding of the U.S. Supreme Court in *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), the above statutory language, even as limited by the interpretations of this court, is vague and imprecise, thus permitting a standardless imposition of the death penalty. We now turn to an examination of *Godfrey v. Georgia*, *supra*. Under Georgia law, if the jury finds the defendant guilty, it is instructed by the court at a separate sentencing phase of the trial on the law of aggravating and mitigating circumstances. The jury then recommends a sentence to the court. As part of that recommendation it must specifically state the supporting aggravating circumstance or circumstances which it finds exist beyond a reasonable doubt. The jury in that case found beyond a reasonable doubt "'that the offense of murder was outrageously or wantonly vile, horrible and inhuman.'" 446 U.S. at 426. The trial court accepted the jury's recommendation, and the Supreme Court of Georgia affirmed. The U.S. Supreme Court reversed the judgment insofar as it levied a death penalty. p. 466

We now quote from or paraphrase pertinent portions of the *Godfrey* opinion: "Under Georgia law, a person convicted of murder may be sentenced to death if it is found beyond a reasonable doubt that the offense 'was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.' Ga. Code § 27-2534.1(b)(7) (1978). In *Gregg v. Georgia*, 428 U.S. 153, the Court held that this statutory aggravating circumstance (§ (b)(7)) is not unconstitutional on its face. Responding to the argument that the language of the provision is 'so broad that capital punishment could be imposed in any murder case,' the joint opinion said:

"'It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction.' [Citation omitted.]" 446 U.S. at 422-23. p. 467

In *Godfrey v. Georgia*, *supra*, the defendant was found guilty and sentenced to death for the murders of his wife and mother-in-law. Briefly, the circumstances of the crimes were that the defendant and his wife were having marital difficulties. When he threatened her with a knife, she left the family home. She commenced an action for divorce, and a court hearing was set. Before the hearing, the defendant, on several occasions, asked his wife to return. At some point during this period she moved in with her mother. The petitioner believed that the mother was actively interfering with a reconciliation. On the day before the crimes, the defendant's wife called him. She said reconciliation was impossible, and allegedly demanded all proceeds from the planned sale of their home. A similar telephone conversation took place about an hour later. The wife at that time allegedly stated that her mother supported her position. The wife then hung up the telephone. Defendant obtained a shotgun and walked to his mother-in-law's trailer home. He saw his wife, mother-in-law, and young daughter playing cards. He fired through a window, killing his wife. He entered the trailer and struck his 11-year-old daughter with the gun barrel and then shot his mother-in-law. Both of the women died instantly from gunshot wounds to the head.

"The issue now before us is whether, in affirming the imposition of the sentences of death in the present case, the Georgia Supreme Court has adopted such a broad and vague construction of the § (b)(7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the United States Constitution." 446 U.S. at 423. "In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer speculation." p. 468

"The standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmance of those sentences by the Georgia Supreme Court. Under state law that court may not affirm a judgment of death until it has independently assessed the evidence of record and determined that such evidence supports the trial judge's or jury's finding of an aggravating circumstance. Ga. Code § 27-2537(c)(2) (1978)." 446 U.S. at 428-29.

The U.S. Supreme Court then went on to discuss previous opinions of the Georgia Supreme Court interpreting Ga. Code Ann. § 27-2534.01(b)(7) (Rev. 1978) and noted that in those cases the Georgia court had appropriately defined and limited the applications of the § 27-2534.01(b)(7) language. It held that in the *Godfrey* case, the Supreme Court of Georgia had not followed the criteria previously established, and concluded: "Nothing said on appeal by the Georgia Supreme Court indicates that it took a different view of the evidence. The circumstances of this case, therefore, do not satisfy the criteria laid out by the Georgia Supreme Court itself in the *Harris* and *Blake* cases. In holding that the evidence supported the jury's § (b)(7) finding, the State Supreme Court simply asserted that the verdict was 'factually substantiated.'" 446 U.S. at 432. The Court further stated: "The petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder. His victims were killed instantaneously. They were members of his family who were causing him extreme emotional trauma." 446 U.S. at 433. p. 469

The Court, in n. 15, stated at 432-33: "The sentences of death in this case rested exclusively on § (b)(7). Accordingly, we intimate no view as to whether or not the petitioner might constitutionally have received the same sentences on some other basis. Georgia does not, as do some States, make multiple murders an aggravating circumstance, as such."

In short, the U.S. Supreme Court's vacation of the death sentence in *Godfrey* rested upon: (1) Lack of precise instructions to the jury and impreciseness of the jury's findings. (2) Failure of the Supreme Court of Georgia to follow its own previously established criteria interpreting § 27-2534.1(b)(7). (3) The court's apparent failure to independently review the factual findings of the trial court and jury. (4) As the U.S. Supreme Court noted, the victim was causing the actor "extreme emotional trauma," and the crime was motivated by overwhelming passion. (It should be noted the factual circumstances in *Godfrey* are quite different from the one before us.) (5) The jury was not instructed on the restricted definition of § 27-2534.1 (b)(7), which had been adopted by the Georgia Supreme Court.

The holding of the U.S. Supreme Court in *Godfrey* clearly does not control in the case before us for a number of reasons. First, the sentencing panel in the case at bar made very specific findings by way of meticulous analysis of the evidence and careful application of the statute as well as this court's prior interpretations thereof. The panel is not an uninstructed jury. Second, the imposition of the death penalty in the case before us did not rest wholly upon a finding of the existence of aggravating circumstance (1)(d) of § 29-2523, which we will discuss in

more detail later since it is the heart of the defendant's argument. Instead, the sentence in this case is supported by the existence of several aggravating circumstances completely supported by uncontroverted evidence. Third, the factual circumstances of the murders in our present case are quite different from those in *Godfrey*, as we have discussed earlier. Fourth, this court does, as we hereafter set forth, review and independently confirm the panel's findings. None of the factors leading to reversal in *Godfrey* exist in this case. p. 470

We now turn to the defendant's claim of vagueness. The U.S. Supreme Court in *Godfrey* did not overrule its previous holding in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). The language of the Georgia statute, § 27-2534.1(b)(7), was not unconstitutional on its face. Aggravating circumstance (1)(d) of § 29-2523 literally, and as interpreted by this court, describes in the disjunctive two separate circumstances which may operate in conjunction with or independent of one another. The first circumstance is that the murder was especially heinous, atrocious, or cruel. We have said that this circumstance is directed to the "pitiless crime which is unnecessarily torturous to the victim" and to cases where torture, sadism, or the imposition of extreme suffering exists. *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977). In this case the sentencing panel found that aggravating circumstance did not exist. We agree. The second circumstance pertains to the state of mind of the actor. In *State v. Stewart, supra*, we said the second instance indicates a situation "where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence" (syllabus of the court), and in *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), it indicates a state of mind "totally and senselessly bereft of any regard for human life" (syllabus of the court). The sentencing panel found the second circumstance did apply. We agree that the following circumstances exhibit a state of mind exceptionally depraved and totally and senselessly bereft of regard for human life: (1) The murders here were coldly planned as a part of the robberies. (2) The evidence clearly supports the conclusion that the murders were to be repetitive, i.e., the defendant intended to continue on his selected course of conduct so long as his needs required. (3) The victims were selected on the basis of certain characteristics which made it easier for the defendant to shoot them, namely, their ages. His unstated conclusion was that a human life in the middle years is less valuable than a younger life. p. 471

The sentence in this case does not rest wholly upon the findings with reference to circumstance (1)(d) of § 29-2523. As the sentencing panel found, and as we independently find, additional independent aggravating circumstances exist. In both the Van Ness and the Helgeland murders, the crimes were committed to conceal the identity of the perpetrator. § 29-2523(1)(b). This, Moore acknowledged, was one of his motives for the killings. In the Helgeland murder there existed yet a third aggravating circumstance, a substantial history of violence, as demonstrated by the Van Ness murder a few days earlier. § 29-2523(1)(a). The sentencing panel carefully analyzed this element in accordance with our prior interpretations. *State v. Rust, supra; State v. Holtan, supra.* In *Holtan* we

said at 546, 250 N.W.2d at 879: "'History' refers to the individual's past acts preceding the incident for which he is on trial and 'substantial,' . . . refers to an actual, material, and important history of acts of terror of a criminal nature. It does not refer to the particular incident involving the homicide for which he is subject to sentence." See, *State v. Perry*, 199 Neb. 656, 261 N.W.2d 95 (1977).

The defendant argues that in imposing the sentence of death, the panel did not apply the provisions of 1978 Neb. Laws, L.B. 711, §§ 29-2519 to 29-2521.04. This argument is founded in part upon the premise that in *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), this court did not properly interpret L.B. 711. p. 472

The act in question provides in part: "(5) In order to compensate for the lack of uniformity in charges which are filed as a result of similar circumstances it is necessary for the Supreme Court to review and analyze all criminal homicides committed under the existing law in order to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances." § 29-2521.01.

"The Supreme Court shall within a reasonable time after July 22, 1978, review and analyze all cases involving criminal homicide committed on or after April 20, 1973. Such review and analysis shall examine (1) the facts including mitigating and aggravating circumstances, (2) the charges filed, (3) the crime for which defendant was convicted, and (4) the sentence imposed. Such review shall be updated as new criminal homicide cases occur." § 29-2521.02.

"The Supreme Court shall, upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances. The Supreme Court may reduce any sentence which it finds not to be consistent with sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524." § 29-2521.03.

"Each district court shall provide all records required by the Supreme Court in order to conduct its review and analysis pursuant to sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524." § 29-2521.04.

In *State v. Williams, supra*, we held that L.B. 711 required this court to review only cases in which the defendant was found guilty of first degree murder, and in *State v. Welsh*, 202 Neb. 249, 275 N.W.2d 54 (1979), we held that the procedure is applicable in this court only when the death penalty is imposed. The defendant, now argues that our reviews have been inadequate, and, in his brief, states: "The concern of the Nebraska Legislature was directed, in part, in insuring that there is uniformity throughout the State in death sentencing. Section 29-2521.01, R.S. Supp. 1978. Obviously, to consider only first-degree murder convictions is to exclude from determination a large group of homicides in which defendants avoided death by being charged with lesser crimes than first-degree murder or by pleading to lesser charges, or by other acts of prosecutorial discretion in interpreting the charging facts. It is a hollow review indeed if these cases are excluded from review. It becomes a cruel facade if a defendant's case is reviewed only against other capital cases and not against lesser homicides which might involve the same or similar circumstances." p. 473

In *State v. Williams, supra* at 76, 287 N.W.2d at 29, we said: "To interpret that language of L.B. 711 literally would create insurmountable constitutional problems. In view of the disposition made here, it is unnecessary to discuss constitutional issues." We did not there elaborate on the constitutional problems except to indicate that they relate to the constitutional division of powers between the branches of government, specifically mentioning prosecutorial discretion. The prosecutor is obviously a member of the executive branch of government. We now find it necessary to delineate the reasons why a literal application of L.B. 711 would unconstitutionally encroach upon the judicial function. In so doing, we will define more precisely the limits within which L.B. 711 may constitutionally be applied.

We first state the underlying legal principles and then illustrate their application. Neb. Const. art. II, § 1, provides: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." a similar division of powers, under the U.S. Constitution, is held to exist by implication. Corwin's The Constitution and What It Means Today at 6-7, 204 (14th ed. H. Chase & C. Ducat 1978); *Hampton & Co. v. United States*, 276 U.S. 394, 48 S. Ct. 348, 72 L. Ed. 624 (1928); *Hayburn's Case*, 2 Dall. 409, 2 U.S. 409, 1 L. Ed. 436 (1792). p. 474

The separation of powers doctrine imposes restrictions upon the legislative branch to limit the judicial functions of the courts. The Legislature cannot, by subsequent legislation, divest rights which have vested by virtue of a judgment. *City of Wayne v. Adams*, 156 Neb. 297, 56 N.W.2d 117 (1952). It cannot enact legislation to retroactively open or vacate a judgment. *Mooney v. Drainage District, on rehearing* 134 Neb. 192, 278 N.W. 368 (1938), *cert. denied* 305 U.S. 622, 59 S. Ct. 84, 83 L. Ed. 398 (1938). The limits of the jurisdiction conferred upon the Supreme Court by the Constitution may not be increased or extended by legislative enactment. *State ex rel. Wright v. Barney*, 133 Neb. 676, 276 N.W. 676 (1937); *Miller v. Wheeler*, 33 Neb. 795, 51 N.W. 137 (1892); *State v. Hall*, 47 Neb. 579, 66 N.W. 642 (1896). It cannot change procedures established by the Constitution. *State ex rel. v. Ellis*, 156 Or. 83, 66 P.2d 995 (1937). It cannot interfere with the judicial function of adjudicating the fact of an acquittal. *In re Johnston*, 3 Cal. 2d 32, 43 P.2d 541 (1935). It may not reverse a judgment. *Roberts v. The State*, 160 N.Y. 217, 54 N.E. 678 (1899). It may not direct the disposition of a case in which jurisdiction has attached. *State v. Costen*, 141 Tenn. 539, 213 S.W. 910 (1919). It is to be clearly implied from the foregoing principles that the Legislature cannot direct the disposition of one case by the factual determinations in another.

It is apparent from the language of § 29-2521.01(5) and § 29-2521.02 that the Legislature attempts to impose a mandate upon this court to look behind prosecutorial judgments concerning the charges to be filed, jury verdicts determining the particular degree of homicide, and then, based upon our independent findings of the facts in those adjudicated cases, to determine the penalty in the case before us. p. 475

We must examine the constitutional import of the foregoing legislative purpose. In examining prosecutorial discretion we would of necessity have to independently gather evidence. The gathering of evidence is not a judicial function but one of the executive. We would then determine what charges we think should have been filed. Again, this is an executive function of the prosecutor. We would make a judgment about the chances of a conviction as against an acquittal, again an executive function. We would need to weigh the advisability of a plea bargain to secure a conviction on a lesser charge in order to avoid a likely acquittal of all charges. These are all clearly executive and not judicial functions.

It must be borne in mind that not all homicide convictions result in appeals to this court. The following illustrates the Legislature's intrusion into the judicial function under L.B. 711. If a person is charged with murder in the first degree but convicted of a lesser degree of homicide, and if L.B. 711 is to be applied literally, we would then, for purposes of reviewing the case before us, disregard the factfindings of the jury in the so-called "analogous" case. Such a procedure would be constitutionally objectionable for a number of reasons. First, it would require this court to find facts in a case not before it. Secondly, it would constitute an attempt by the Legislature to make the factfindings of one case determinative of the sentence in another case on review. It is plain that under the principles we have earlier cited, that legislation which attempts to achieve such results is an intrusion on the judicial function, contrary to the separation of powers doctrine, and thus violates article II, § 1. p. 476

Another effect of L.B. 711 would be to unconstitutionally restrict the appellate review powers of this court under Neb. Const. art. I, § 23, as that legislation attempts to bind this court by requiring it to apply sentences imposed in some "analogous" case in a district court. It is clear that applying such a standard would restrict a defendant's right to an independent review by this court under article I, § 23, of the Bill of Rights of our Nebraska Constitution. This section provides: "In all cases of felony the defendant shall have the right of appeal to the Supreme Court; and in capital cases such appeal shall operate as a supersedeas to stay the execution of the sentence of death, until further order of the Supreme Court."

Upon this closer review of L.B. 711, it is clear the Legislature in that act attempts to exercise the judicial function in violation of the Constitution. Sections 2 and 3 of L.B. 711 must be restricted in their application to a comparison in this court of only those cases in which the defendant in the District Court has been convicted of murder in the first degree.

L.B. 711 thus construed is coextensive with our duty under the federal Constitution, under our own state Constitution, and under the statutory provisions for automatic review to determine in the death penalty cases which come before us whether the provisions of § 29-2523 are properly applied, and to assure the death penalty is not arbitrarily and capriciously imposed. *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972); *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977). We will, of course, continue to make comparisons. Each District Court will continue to furnish to this court, in accordance with our previous administrative order, the records of all convictions of first degree murder not appealed to this court. § 29-2521.04. If either the State or the defendant

wishes to call to the attention of the sentencing judge or sentencing panel, for the purposes of comparison, the facts and sentence in any case of first degree homicide which has not been appealed to this court, it should be done at the sentencing hearing by means of admissible evidence for which proper foundation is laid. This, of course, will mean, in most cases where the fact is not admitted or is challenged, producing the official records or pertinent portions thereof of the case which is to be called to our attention. p. 477

At the sentencing hearing in this case the defendant introduced an exhibit related to the case of *State v. Cecil Henry Floyd* in the District Court for Hamilton County, Nebraska. This is one of the unappealed cases reviewed by this court in *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979). Although not specifically argued, it clearly appears the apparent purpose of introducing the exhibit was to raise the issue of whether an isolated case in which the death penalty perhaps should have been imposed, but was not, becomes the standard which governs all capital cases before this court.

In the exhibit just referred to above is a two-page type-written summary, obviously prepared by counsel, which among other things contains the following statement: "Source of Information," followed by the name of the prosecutor and defense counsel in that case. The summary otherwise purports to show that Floyd, previous to the Nebraska homicide (felony murder in the course of a robbery), was serving a term of life imprisonment for homicide in Indiana and had pled guilty to three homicides in Florida. We have again reviewed the official transcript of the *Floyd* case. Proof was made in that case of the Indiana conviction only and none of the circumstances of the Indiana case are shown by the record. The only pertinent other evidence adduced at the sentencing hearing was the testimony of the victim's mother, in which she requested the death penalty not be imposed, and the testimony of the defendant Floyd, in which he stated he had not intended to kill the victim but that the gun discharged in the course of a struggle when the victim attempted to take the weapon away from him. the defendant also recited a history of mental illness. p. 478

In the *Floyd* case the sentencing judge, in ruling upon an objection to the presentence investigation report, stated he would take into consideration only those matters therein which were properly before him, i.e., insofar as other murder convictions were concerned, those that were proved by proper evidence and not the hearsay testimony of defense counsel and prosecutor. The sentencing judge did not make detailed findings as to aggravating and mitigating circumstances. He apparently regarded the imposition of the penalty as being within his "discretion." He imposed a sentence of life imprisonment, to be served consecutive to the Indiana life sentence and consecutive to any other sentence the defendant might serve elsewhere, allowing no credit on the Nebraska life sentence for any time served elsewhere. The court directed that the defendant be returned to Indiana and that "holds" be placed by the Indiana sheriff as well as any other states' sheriffs in which the defendant was wanted. It may be that the death sentence should have been imposed in the *Floyd* case had proper proof been made, but such a determination is impossible from the limited record before us. The record showed no competent proof of the alleged Florida homicides

or of the circumstances surrounding them. Nor was there any proof of the circumstances surrounding the Indiana case. If the State wishes to prove as an aggravating circumstance a conviction of the defendant in other states, it must do so by authenticated copies of such conviction unless, of course, the fact is admitted.

Our reading of *Godfrey* does not lead us to an understanding that an isolated, unappealed trial court judgment is to be the standard by which all other sentences must be judged. The U.S. Supreme Court's purpose in that case was to mandate the death penalty not be inflicted arbitrarily and capriciously. The Court imposed upon the states the duty of defining the circumstances under which the death penalty should be imposed in such a way as to obviate "standardless" sentences. Section 29-2523, as interpreted and limited by this court, does afford "specific and detailed guidance" in the imposition of sentence and makes "rationally reviewable the process for imposing a sentence of death." *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980).

p. 479

The defendant argues that the sentencing panel erred in finding that a mitigating factor, to wit, "(2)(a) The offender has no significant history of prior criminal activity," did not exist. The record disclosed that the defendant had one previous felony conviction, auto theft, for which he served a term of 1 to 2 years in the Nebraska Penal and Correctional Complex, and that he admitted having forged approximately $1,100 in checks prior to the crimes involved here. The panel also mentioned that he had a juvenile record of lesser offenses. The defendant argues that "consideration" of the latter was error. We hold that this particular juvenile record should be disregarded. What, if any, offenses in a juvenile record should be considered and under what category of aggravating or mitigating factors will obviously depend upon the nature of the act. Nonetheless, the commission of two felonies cannot support a finding that there is no significant prior criminal history. In any event, this mitigating factor, even if it were said to exist, does not, even when considered with family history, outweigh the aggravating factors.

The records and the convictions since *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), which we have reviewed disclose that the standards of § 29-2523 are being carefully applied by the sentencing judge or panel.

p. 480

The defendant asserts that § 29-2523 is unconstitutional because it limits the mitigating factors which may be considered in determining sentence. There is no basis for this contention. Section 29-2521 provides in part: "[E]vidence may be presented as to any matter that the court deems relative to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523. Any such evidence which the court deems to have probative value may be received." In *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), we specifically held that the consideration of mitigating factors or circumstances was not limited by the statute. Evidence in mitigation need only be relevant and probative. The defendant cannot complain of a provision so obviously open-ended in the accused's favor.

The defendant's seventh assignment is as follows: "A conviction and sentence in a capital case cannot be sustained unless it appears, beyond a reasonable doubt, that no error in the fact-finding of trial contributed in any way to the jury's determination of guilt." The defendant's argument on this point is so convoluted as to literally make no sense. The defendant has made no claim of error in the factfinding process leading to the determination of guilt. We have examined the record and found none. The defendant was guilty beyond any doubt at all.

The defendant's eighth assignment asserts that the State has the burden of proving beyond a reasonable doubt that no mitigating factor exists. He cites no authority for this proposition. None seems to exist. There is no evidence or claim that the State suppressed any favorable evidence. If there were any mitigating factors other than those shown, the defendant is in the best position to know and reveal those factors.

The death sentence in this case is affirmed.

AFFIRMED

KRIVOSHA, C. J., and WHITE, J., concur in that portion of the opinion affirming the conviction, and dissent from that portion of the opinion affirming the imposition of the death penalty. We would have sentenced the appellant to be confined for the balance of his natural life.

p. 481

28-303. Murder in the first degree: penalty. A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or (3) by administering poison or causing the same to be done; or if by willful and corrupt perjury or subornation of the same he purposely procures the conviction and execution of any innocent person. The determination of whether murder in the first degree shall be punished as a Class I or Class IA felony shall be made pursuant to sections 29-2520 to 29-2524.

29-2519. Statement of intent. The Legislature hereby finds that it is reasonable and necessary to establish mandatory standards for the imposition of the sentence of death, that the imposition of the death penalty in every instance of the commission of the crimes specified in section 28-303 fails to allow for mitigating factors which may dictate against the penalty of death, and that the rational imposition of the death sentence requires the establishment of specific legislative guidelines to be applied in individual cases by the court. The Legislature therefore determines that the death penalty should be imposed only for the crimes set forth in section 28-303 and, in addition, that it shall only be imposed in those instances when the aggravating circumstances existing in connection with the crime outweigh the mitigating circumstances, as set forth in sections 29-2520 to 29-2524.

29-2520. Murder; person found guilty; sentence; determination. Whenever any person is found guilty of a violation of section 28-303, the district court shall within seven days fix a date for hearing on determination of the sentence to be imposed. Such determination shall be made by: (1) The judge who presided at the trial or who accepted the plea of guilty; (2) a panel of three judges including the judge who presided or accepted the plea, the two additional judges having been designated by the Chief Justice of the Supreme Court after receiving a request therefor from the presiding judge; or (3) a panel of three district judges named by the Chief Justice of the Supreme Court when such Chief Justice has determined that the presiding judge is disabled or disqualified after receiving a suggestion of such disability or disqualification from the clerk of the court in which the finding of guilty was entered.

29-2521. Determination of sentence; procedure. In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523. Any such evidence which the court deems to have probative value may be received. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The court shall set forth the general order of procedure at the outset of the sentence determination proceeding.

29-2521.01. Legislative findings. The Legislature hereby finds that:

(1) Life is the most valuable possession of a human being, and before taking it, the state should apply and follow the most scrupulous standards of fairness and uniformity;

(2) The death penalty, because of its enormity and finality, should never be imposed arbitrarily nor as a result of local prejudice or public hysteria;

(3) State law should be applied uniformly throughout the state and since the death penalty is a statewide law an offense which would not result in a death sentence in one portion of the state should not result in death in a different portion;

(4) Charges resulting from the same or similar circumstances have, in the past, not been uniform and have produced radically differing results, and

(5) In order to compensate for the lack of uniformity in charges which are filed as a result of similar circumstances it is necessary for the Supreme Court to review and analyze all criminal homicides committed under the existing law in order to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances.

29-2521.02. Criminal homicide cases; review and analysis by Supreme Court; manner. The Supreme Court shall within a reasonable time after July 22, 1978, review and analyze all cases involving criminal homicide committed on or after April 20, 1973. Such review and analysis shall examine (1) the facts including mitigating and aggravating circumstances, (2) the charges filed, (3) the crime for which defendant was convicted, and (4) the sentence imposed. Such review shall be updated as new criminal homicide cases occur.

29-2521.03. Criminal homicide cases; appeal; sentence; Supreme Court review. The Supreme Court shall, upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances. The Supreme Court may reduce any sentence which it finds not to be consistent with sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524.

29-2521.04. Criminal homicide cases; Supreme Court review and analyze; district court; provide records. Each district court shall provide all records required by the Supreme Court in order to conduct its review and analysis pursuant to sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524.

29-2522. Sentence; death; life imprisonment; determination of death in writing. After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

29-2523. Aggravating and mitigating circumstances, defined. The aggravating and mitigating circumstances referred to in sections 29-2521 and 29-2522 shall be as follows:

(1) Aggravating Circumstances:

(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;

(b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;

(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

(e) At the time the murder was committed, the offender also committed another murder;

(f) The offender knowingly created a great risk of death to at least several persons;

(g) The victim was a law enforcement officer or a public servant having custody of the offender or another, or

(h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

(2) Mitigating Circumstances:

(a) The offender has no significant history of prior criminal activity;

(b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

29-2524. Existing procedures; act does not repeal. Nothing in sections 24-342, 28-303, 28-313, 29-2519 to 29-2546 and sections 29-2521.01 to 29-2521.04 shall be in any way deemed to repeal or limit existing procedures for automatic review of capital cases, nor shall it in any way limit the right of the Supreme Court to reduce a sentence of death to a sentence of life imprisonment in accordance with the provisions of section 29-2308, nor shall it limit the right of the Board of Pardons to commute any sentence of death to a sentence of life imprisonment.

29-2524.01. Criminal homicide; report filed by county attorney; contents. Each county attorney shall file a report with the State Court Administrator for each criminal homicide case filed by him. The report shall include (1) the initial charge filed, (2) any reduction in the initial charge and whether such reduction was the result of a plea bargain or some other reason, (3) dismissals prior to trial, (4) outcome of the trial including not guilty, guilty as charged, guilty of a lesser included offense, or dismissal, (5) the sentence imposed, (6) whether an appeal was taken, and (7) such other information as may be required by the State Court Administrator. Such report shall be filed not later than thirty days after ultimate disposition of the case by the court.

29-2524.02. State Court Administrator; criminal homicide report; provide forms. The State Court Administrator shall provide all forms necessary to carry out sections 29-2524.01 and 29-2524.02.

29-2525. Punishment is capital; appeal; clerk of district court; transcript; prepare; file; no charge; Clerk of Supreme Court; writ of error; issue. In cases when the punishment is capital, no petition in error shall be required and within the time prescribed by section 25-1931 for the commencement of proceedings for the reversing, vacating, or modifying of judgments, the clerk of the district court in which the conviction was had shall prepare and file with the Clerk of the Supreme Court a transcript of the record of the proceedings, for which no charge shall be made. The Clerk of the Supreme Court shall, upon receipt of the transcript, issue a writ of error. Such writ shall be returnable before the Supreme Court and the payment of a

29-2528. Conviction; punishment is capital; writ of error; suspension of execution; hearing. In all cases of conviction when the punishment shall be capital, the judges or court shall allow such writ of error as a matter of right, and shall order a suspension of the execution until such writ of error shall be heard and determined. Upon hearing such writ of error, it shall order the prisoner to be discharged, a new trial to be had, or appoint a day certain for the execution of the sentence, as the nature of the case may require.

THE CONSTITUTION OF THE UNITED STATES

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NO. 81-6435

RECEIVED
MAR 27 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CAREY DEAN MOORE,

Petitioner,

vs.

THE STATE OF NEBRASKA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, Carey Dean Moore, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of the State of Nebraska without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The Petitioner's Affidavit in support of this Motion, with certified copies of previous orders in this regard from the District Court of Douglas County, Nebraska, is attached hereto.

CAREY DEAN MOORE, Petitioner,

By _____

STANLEY A. KRIEGER
Assistant Public Defender
306 Hall of Justice
Omaha, Nebraska 68183
One of His Attorneys

RECEIVED
MAR 27 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

CAREY DEAN MOORE,	)	NO.
	)	
Petitioner,	)	
	)	
vs.	)	AFFIDAVIT IN SUPPORT OF MOTION
	)	TO PROCEED IN FORMA PAUPERIS
THE STATE OF NEBRASKA,	)	
	)	
Respondent.	)	

I, Carey Dean Moore, being first duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my motion to proceed by petition for writ of certiorari to the Supreme Court of the State of Nebraska without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor and that I believe I am entitled to redress.

That I was convicted by the District Court of Douglas County, Nebraska at trial by jury of two counts of First Degree Murder and was sentenced to death on each First Degree Murder charge. I am presently incarcerated in the Nebraska Penal and Correctional Complex in Lincoln, Nebraska.

That in the District Court of Douglas County, Nebraska, I requested the Court to appoint counsel since I was unable to afford the cost of an attorney or other costs arising out of the charges against me and that the Douglas County District Court did, upon my request, appoint the Douglas County Public Defender's Office to represent me in the matter of the criminal charges pending against me.

That upon my appeal to the Supreme Court of Nebraska, I continue to be represented by the Douglas County Public Defender's Office since I was unable to bear the costs of continued legal action in this case.

Because of my present incarceration in the Nebraska Penal and Correctional Complex on two sentences of death, I am not employed nor do I have any cash or assets with which to finance proceedings in my case.

I understand that false statements in this Affidavit will subject me to penalties for perjury.

Carey D. Moore 32942
CAREY DEAN MOORE

SUBSCRIBED AND SWORN to before me this 5th day of March, 1982.

GENERAL NOTARY - State of Nebraska
JAMES R. LYONS
My Comm. Exp. July 7, 1983

James R Lyons
Notary Public

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff, vs. CAREY D. MOORE, Defendant.	DOC. 106 106	NO. 54 55

POVERTY AFFIDAVIT

STATE OF NEBRASKA)
) SS
COUNTY OF DOUGLAS)

The undersigned, being first duly sworn on oath, deposes and states that I am the defendant in the above entitled cause of action, that I am completely without funds or property of any kind which I can use to defend myself, and that, therefore, I request that the costs and fees in connection with my case be charged to Douglas County, Nebraska, for the reason I am unable to pay said costs.

Further, I request appointment of counsel to represent me and to advise me as to my rights under the law.

Carey D. Moore
Defendant

SUBSCRIBED AND SWORN to before me this 27th day of September, 1979.

District Judge

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA
SEP 28 1979
CLERK

THE STATE OF NEBRASKA, Plaintiff,
vs. 106-55 INFORMATION: Murder In The First Degree - Two Counts
Carey Dean Moore, Defendant,

Public Defender is appointed to represent the defendant.

Defendant, present with counsel, Joseph Bataillon, was duly arraigned and stood mute. The Court enters a plea of not guilty for the defendant.

Cause set for trial to the next jury panel or as soon thereafter as it may be reached.

Defendant remanded to the custody of the Sheriff.

By agreement of counsel, defendant's motion for discovery and the State's motion for reciprocal discovery are sustained.

Mutual and reciprocal discovery ordered.

PAUL J. HICKMAN, JUDGE

THE STATE OF NEBRASKA,)
) SS.
COUNTY OF DOUGLAS.)

I, RUDY J. TESAR, Clerk of the District Court, Fourth Judicial District of Nebraska, within and for said County, do hereby certify that the above and foregoing are true and correct copies of POVERTY AFFIDAVIT and ORDER APPOINTING PUBLIC DEFENDER TO REPRESENT DEFENDANT, ETC., filed for and entered of record and designated as Criminal Docket 106 Number 055,

in a cause in said Court wherein THE STATE OF NEBRASKA is Plaintiff

and CAREY DEAN MOORE is Defendant

as the same appears fully upon the records and in the files of said Court now in my charge remaining as Clerk aforesaid.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Omaha, Nebraska, this 22nd day of March A. D. 19 82

RUDY J. TESAR
Clerk

BY Steven W. Wilke
Deputy

81-6435

No. _____

RECEIVED
APR 23 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CAREY DEAN MOORE,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

PAUL L. DOUGLAS
Attorney General

J. KIRK BROWN
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-4906
Tel: (402) 471-2682

Attorneys for Respondent.

QUESTIONS PRESENTED FOR REVIEW

1. Does the Supreme Court of the State of Nebraska's interpretation of Neb.Rev.Stat. §29-2521.03 (Reissue 1979) violate the Eighth and Fourteenth Amendments.

Respondent accepts the petitioner's remaining statements of issues presented.

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SUMMARY OF ARGUMENT

1. It is the duty of the Nebraska courts to interpret Nebraska statutes.

2. The present system for state appellate review of sentences of death imposed under Nebraska statutes adequately provides the level of review required for the proper imposition of a sentence of death under the Eighth and Fourteenth Amendments.

3. The language of the aggravating circumstance challenged here is not unconstitutionally vague.

4. The penalty phase findings of fact relied upon by the reviewing state appellate court in affirming this sentence of death are supported by the record.

ARGUMENT

I.

IT IS THE DUTY OF THE NEBRASKA COURTS TO INTERPRET NEBRASKA STATUTES.

The petitioner first complains that the Supreme Court of the State of Nebraska has improperly interpreted Neb.Rev.Stat. §29-2521.03 (Reissue 1979) [Nebraska Laws 1978, LB 711]. It is the duty of the court system of every state to interpret that state's legislative enactments. In no respect does the responsibility for the correct interpretation of state statutes fall to this court. The petitioner states no basis for the granting of the relief requested in this particular issue.

II.

THE PRESENT SYSTEM FOR STATE APPELLATE REVIEW OF SENTENCES OF DEATH IMPOSED UNDER NEBRASKA STATUTES ADEQUATELY PROVIDES THE LEVEL OF REVIEW REQUIRED FOR THE PROPER IMPOSITION OF A SENTENCE OF DEATH UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

The next question is whether the state court's interpretation of Neb.Rev.Stat. §29-2521.03 (Reissue 1979) has led to a constitutionally unacceptable imposition of a sentence of death in this case. We do not believe that it has.

In reviewing the necessary procedures for the imposition of such a penalty the Nebraska court noted:

> LB 711 thus construed is coextensive with our duty under the federal Constitution, under our own state Constitution, and under the statutory provisions for automatic review to determine in the death penalty cases which come before us whether the provisions of §29-2523 are properly applied, and to assure the death penalty is not arbitrarily and capriciously imposed.

State v. Moore, 210 Neb. 457, 476, 316 N.W.2d 33 (1982).

> Our reading of Godfrey [v. Georgia, 446 U.S. 420 (1980)] does not lead us to an understanding that an isolated, unappealed trial court judgment is to be the standard by which all other sentences must be judged. The U.S. Supreme Court's purpose in that case was to mandate the death penalty not be inflicted arbitrarily and capriciously.

Id. 210 Neb. at 478-479.

The state court has correctly ascertained what is mandated by the Eighth and Fourteenth Amendments. In so doing, they have shown appropriate deference to the Eighth and Fourteenth Amendment rights of the petitioner in affirming his sentence of death. The petitioner raises no basis for the relief sought here on this issue.

III.

THE LANGUAGE OF THE AGGRAVATING CIRCUMSTANCES CHALLENGED HERE IS NOT UNCONSTITUTIONALLY VAGUE.

The petitioner next argues that the finding regarding one of the statutory aggravating circumstances found applicable to him is contrary to this court's holding in Godfrey v. Georgia, supra. The state appellate court set forth its interpretation of the aggravating circumstances here in question as follows:

> The U.S. Supreme Court in Godfrey did not overrule its previous holding in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The language of the Georgia statute, §27-2534.1(b)(7), was not unconstitutional on its face. Aggravating circumstance (1)(d) of §29-2523 literally, and as interpreted by this court, describes in the disjunctive two separate circumstances which may operate in conjunction with or independent of one another. The first circumstance is that the murder was especially heinous, atrocious, or cruel. We have said that this circumstance is directed to the "pitiless crime which is unnecessarily torturous to the victim" and to cases where torture,

> sadism, or the imposition of extreme suffering exists. State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (1977); State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977). In this case the sentencing panel found that aggravating circumstance did not exist. We agree. The second circumstance pertains to the state of mind of the actor. In State v. Stewart, supra, we said the second instance indicates a situation "where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence" (syllabus of the court), and in State v. Holtan, 197 Neb. 544, 250 N.W.2d 876 (1977), it indicates a state of mind "totally and senselessly bereft of any regard for human life" (syllabus of the court). The sentencing panel found the second circumstance did apply. We agree that the following circumstances exhibit a state of mind exceptionally depraved and totally and senselessly bereft or regard for human life: (1) The murders here were coldly planned as a part of the robberies. (2) The evidence clearly supports the conclusion that the murders were to be repetitive, i.e., the defendant intended to continue on his selected course of conduct so long as his needs required. (3) The victims were selected on the basis of certain characteristics which made it easier for the defendant to shoot them, namely, their ages. His unstated conclusion was that a human life in the middle years is less valuable than a younger life.

State v. Moore, supra, 210 Neb. at 470-471. Again, this analysis shows appropriate concern for the problems noted by this court in Godfrey v. Georgia, supra. We are aware of no constitutional infirmity in the facts which constitute a particular type of criminal offense, e.g., capital murder, also describing a statutory aggravating circumstance. Nebraska statutes do not impose the death penalty automatically upon any person convicted of capital murder, nor does a conviction for capital murder mandate a finding by the sentencing entity that the aggravating circumstance here in question is applicable. The fact that the actions of a capital murderer may require a finding that this aggravating circumstance is present implies nothing more than the fact that such crimes often offend all standards of morality and intelligence.

We are commanded by the Constitution to reasonably classify homicides and to distinguish the many murderers who

do not "deserve" the penalty of death from the few who do. The petitioner should not be heard to complain simply because he has been reasonably classified as being among the few upon whom this penalty may be imposed. The test should not be that only a few of the most depraved killers should receive the death penalty. All reasonably found to be members of this class are appropriately subject to a sentence of death. The test is to reasonably distinguish the many whose acts of homicide are not as depraved as those of the petitioner from the few which are similar in nature.

IV.

THE PENALTY PHASE FINDINGS OF FACT RELIED UPON BY THE REVIEWING STATE APPELLATE COURT IN AFFIRMING THIS SENTENCE OF DEATH ARE SUPPORTED BY THE RECORD.

The petitioner also claims that there exists no factual basis for the sentencing entity's finding that, to the petitioner "human life in the middle years is less valuable than a younger life." State v. Moore, supra, 210 Neb. at 471. That claim is unfounded. The petitioner's own words establish this fact.

Submitted as evidence at the petitioner's trial were two recorded confessions made by the petitioner to police officers (Exhibits 61 & 62). In Exhibit 61, the petitioner's confession to the Van Ness murder, the following dialogue took place:

> Q. Why did you go to the Smoke Pit and order the cab?
>
> A. Because I wanted to make sure that the guy wasn't that young.
>
> . . .
>
> Q. What was your plan then? I mean, to see an old guy and then you were going to rob him or what?
>
> A. Right.
>
> . . .
>
> Q. Why did you decide that that [Van Ness] was the one?
>
> A. He wasn't too young.

In Exhibit 62, the petitioner's confession to the Helgeman murder, the following dialogue took place:

> Q. When you went to the cab, how come you singled out this cab that you eventually got in, how come you decided to take that cab?
>
> A. It was an older guy, kind of.
>
> . . .
>
> Q. Why do you pick out the older men to shoot?
>
> A. I don't know. It's slightly easier for me to do it. If it's a young guy, around my age, I couldn't do it. I don't think so at least.

See also, 1019:18-1021:7.

Certainly this is sufficient evidence for the court's conclusion that the petitioner valued the lives of older men less than the lives of younger men. In view of the evidence submitted at petitioner's trial the court was justified in its conclusion.

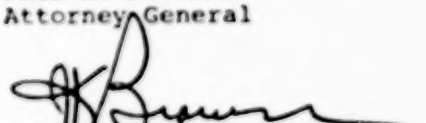
CONCLUSION

The petitioner has failed to establish any basis for the relief requested.

Respectfully submitted,

STATE OF NEBRASKA, Respondent,

By PAUL L. DOUGLAS
Attorney General

By 

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